United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

ORIGINAL

75-7159

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7159

INTERNATIONAL ELECTRONICS CORPORATION AND ELECTRO MOTIVE CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

against

JOSEPH FLANZER, JULIUS APTER, JOHN SINDER, SAUL LEWIS, IRVING BEIN, PHILIP BEIN; JULIUS APTER, MORRIS APTER and NICHOLAS A. LENGE, d/b/a APTER, NAHUM & LENGE,

Defendants-Appellants-Cross Appellees,

J. KEVIN FOLEY,

Defendant.

REPLY BRIEF OF PLAINTIFFS-APPELLEES-CROSS APPELLANTS IN FURTHER SUPPORT OF CROSS-APPEAL

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL ELECTRONICS CORPORATION and ELECTRO MOTIVE CORPORATION,	:	
Plaintiffs-Appellees-Cross Appellants,	:	
-against-	:	No. 75-7159
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REPLY BRIEF OF PLAINTIFFS-APPELLEES-CROSS APPELLANTS IN FURTHER SUPPORT OF CROSS-APPEAL

Preliminary Statement

This reply brief is respectfully submitted in further support of the cross appeal of plaintiffs-appellees-cross appellants International Electronics Corporation ("IEC") and Electro Motive Corporation ("EMC") (hereinafter collectively referred to as "plaintiffs") and in response to the reply brief of defendants-appellants-cross appellees ("defendants").

By the cross-appeal, plaintiffs seek a modification of the District Court's order so as to require the immediate disqualification of defendants' attorneys, Apter, Nahum & Lenge (the "Apter firm") rather than limiting such disqualification, as the District Court did, to participation at trial.

An analysis of defendants' reply brief reveals that it fails to come to grips with the undisputed and critical facts mandating immediate disqualification of the Apter firm. It relies instead on hyper-technical distinctions, exalting form over substance, completely unsupported by the language of the Code of Professional Responsibility and case authority. Defendants' reply brief is an attempt to persuade this court that the Apter firm's continued participation in the defense of this lawsuit brought by their former client and based on a transaction in which the firm and its then senior partner were actively involved in a variety of professional and personal capacities is consistent with the Code.

ARGUMENT

CANONS 4, 5 AND 9 AND THE RELATED DISCIPLINARY RULES AND ETHICAL CONSIDERATIONS BAR THE APTER FIRM FROM REPRESENTING THE SIX INDIVIDUAL DEFENDANTS IN THIS LITIGATION

This reply brief will respond to defendants' reply

brief on a page by page basis in order to expose the crucial omissions and errors contained therein.

Page 1, first paragraph: Defendants open their reply brief by baldly proclaiming that plaintiffs' brief "switch(es) the focus of their earlier trial court arguments from the Canon 5 admonition prohibiting a lawyer from appearing as both witness and advocate, to the Canon 4 concern for preservation to a client of the duty of confidentiality owed him by the attorney." While it is difficult to comprehend the significance or relevance of this criticism on the issue of "emphasis" to the serious issues at bar, it is sufficient to note that all arguments raised on this appeal were presented to the District Court for consideration. The Canon 4 and 9 points were discussed at length in plaintiffs' reply memorandum of law submitted to the District Court. In addition the transcript of the oral argument before the District Court evidences the fact that both sides extensively argued the applicability of Canon 4 to the issues before that Court (See Transcript of Oral Argument, pp. 33-66).

Page 1 (bottom) - Page 2: Defendants concede, as they must, the force and vitality of such Second Circuit decisions as Emle Industries, Inc. v. Patentex, 478 F.2d 562 (2d Cir. 1973) and Hull v. Celanese Corp., No. 74-2126 (2d Cir. 3/26/75) requiring the application of a strict prophylactic rule to enforce compliance with the Code of Professional Responsibility and

that all doubts be resolved in favor of disqualification. Defendants, however, seek to avoid the obvious impact of such decisions by arguing that solely because the Apter firm's former client, ELMENCO, was not the survivor of the merger with EMC, the requisite attorney-client relationship between the Apter firm and plaintiff EMC is absent at bar. Defendants repeat this argument at pages 4 and 7. This "technical" argument overlooks the undisputed record facts. For many years prior to the underlying merger transaction the Apter firm represented ELMENCO. As a result of the merger, ELMENCO became IECONN, Inc. which subsequently changed its name to EMC, one of the plaintiffs herein. It is clear that EMC, as the surviving corporation of the merger, is in fact the enterprise of the Apter firm's former client ELMENCO. It wound up with all the ELMENCO assets, all the ELMENCO liabilites, and continues to own and operate the ELMENCO business. Had the corporate transaction taken the form of a stock sale the Apter firm could not seriously claim that a change in the identity of ELMENCO's stockholders had any effect on its professional obligations under the Code. (See Agreement, par. 2.1 (A32); Connecticut Stock Corporation Act, Section 33-369). The important public policy considerations underlying Canons 4 and 9 are not altered merely

by reason of the technical form of the underlying corporate transaction. A corporation should not be limited in its ability to freely and openly communicate with its attorneys because of a fear that a subsequent merger will result in permitting its attorneys to use the information obtained to the disadvantage of the business enterprise.

Page 3(top): Belatedly recognizing that the Apter firm's claimed prior representation of the plaintiffs in the merger transaction mandates disqualification at bar, defendants now seek to avoid such result by arguing that plaintiffs dispute the Apter firm's claim and have stated that Donald Shack, Esq. and his "firm served as counsel to IEC throughout the negotiations leading to the consummation of the merger" (A15,16). It is true that IEC was represented by the New York firm of Golenbock and Barell in the merger transaction. But it is equally true that in the instant lawsuit the Apter firm has filed a counterclaim for substantial legal fees due for services allegedly rendered on behalf of plaintiffs in connection with the underlying merger, which was denied by plaintiff's pleading (A55-56 n.3). Irrespective of which party prevails on the Apter firm's counterclaim, the essential point is that the mere assertion of such claim is tantamount to an admission by the Apter firm of prior representation of plaintiffs since it is clear that attorneys are obligated

not to file pleadings unless they believe them to be meritorious. From the Apter firm's point of view, therefore its claimed prior representation of plaintiffs coupled with its representation at bar of the individual defendants amounts to prohibited "side-switching".

Page 3 (bottom) - page 4 (top): Defendants rhetorically ask whether "the disqualification of retired-lawyer, Julius Apter's former law partners, [will] somehow perforce sanitize Julius Apter Defendant?" This completely misses the central issue before this Court. Nobody is seeking to "sanitize" Julius Apter. It is presumed that this individual defendant, as well as the others will testify in pre-trial and trial proceedings and do what he deems necessary to defend the claims asserted against them. However, the issue at bar is whether the Apter firm can represent Julius Apter and five other individual defendants in this endeavor where such representation is in violation of Canons 4, 5 and 9. That defendant Julius Apter is a former member of the Apter firm, does not lessen the Apter firm's obligations to abide by the Code of Professional Responsibility. Defendants' contention that the disqualification of the Apter firm "would do nothing to 'enforce the lawyer's duty of absolute fidelity and guard against the danger of inadvertent use of

confidential information'", evidences a callous disregard of the Code provisions governing an attorneys duty of confidentiality to a former client.* (See plaintiffs' main brief, pps. 15-22).

Page 5: Defendants argue that plaintiffs cannot "represent that they ever disclosed a single fact in reliance upon a duty of lawyer-client confidentiality." Such argument overlooks the point that whether confidences actually passed between attorney and client is irrelevant to a Canon 4 determination. As stated by Judge Weinfeld in T.C. & Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268-9 (S.D.N.Y. 1953):

> "The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter

*Defendants' citation of Meyerhofer v. Empire Fire and Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974) and Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975) is misplaced. The "right to self-defense" referred to in the Court of Appeals decision in Meyerhofer, was concerned solely with the qualified right given an attorney under DR4-101(c) to reveal confidences or secrets necessary to defend himself against "an accusation of wrongful conduct". At bar, there has been no accusation of wrongful conduct against the Apter firm which would permit it to take advantage of this limited exception. In Ceramco, plaintiff's counsel had telephoned defendant's employees to obtain non-privileged, relevant and accurate information as to jurisdiction and venue. In refusing to disqualify plaintiff's counsel the Court of Appeals found that "this is the kind of misconduct, if it is misconduct, which is technical in character, does no violence to any of the fundamental values which the canons were written to protect and certainly falls far short of justifying a grant of the relief requested". 510 F. 2d at 268. The unique fact situation present in Ceramco has no application to the facts at bar.

> of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained."

Similarly, in Emle Industries, Inc. v. Patentex, 478 F.2d 562, 571 (2d Cir. 1973) this Court stated:

> "...the court need not, indeed cannot, inquire whether the lawyer did in fact, receive confidential information during his previous employment which might be used to the client's disadvantage."

Moreover, the Apter firm does not and cannot deny that during the course of its representation of ELMENCO, confidences did pass between the Apter firm and ELMENCO on the very matters forming the basis of plaintiffs' fraud complaint. See plaintiffs' main brief, pp. 11-12.

Page 5 (bottom): Defendants erroneously contend that "the integrity of the judicial process is not threatened by allowing a retired attorney to engage his former partners to defend him against allegations of fraud and deceit." This statement is misleading and begs the question. The question which must be addressed, and which defendants avoid, is whether the integrity of the judicial process and the public interest is threatened by permitting the Apter firm to represent six individual defendants in a lawsuit brought under the anti-fraud provisions of the Federal Securities Laws by the business enterprise formerly represented by the

Apter firm for misrepresentations and omissions in a transaction in which the Apter firm played an active role and its then senior partner participated in numerous capacities and obtained a substantial personal benefit as a principal. Not one of the published decisions directing disqualification involves such a panoply of facts mandating disqualification.

Page 6 (bottom) - Page 7 (top): Defendants erroneously read Canon 9 and its warning that "a lawyer should avoid even the appearance of professional impropriety" as limited to "former judicial officers and public employees taking on private employment as lawyer and, second, the administration and protection of client's funds in the hands of lawyers." Such a narrow construction of Canon 9 totally ignores established law. See Emle Industries, Inc v. Patentex, 478 F.2d 562 (2d Cir. 1973); Hull v. Celanese, No. 74-2126 (2d Cir. 3/26/75)(neither involve either former judicial officers and public employees, or the administration of a client's funds). Moreover, such argument verges on the frivolous given the broad scope of Ethical Consideration 9-6.

Page 7: Defendants do not quarrel with plaintiffs' statement that the Apter firm is named in this action as "merely a stakeholder" and that the complaint "seeks no affirmative relief against the assets of the Apter firm." (Plf. Br., p. 36) Yet, the Apter firm seeks to remain in this case as

attorneys for six individual defendants by arguing that the merger agreement "imposes the obligation and responsibility of defense upon Apter, Nahum & Lenge" and "plaintiffs are estopped from frustrating that defense by the expedient of naming Apter, Nahum & Lenge as defendants." There are three responses appropriate to this baseless argument.

First, a careful reading of the Agreement does not evidence any requirement that the Apter firm defend against claims made upon the escrow fund. On the contrary, such right to defend is expressly limited by the Agreement to the Escrow Agent's joining in the defense of any such claim, and only if notice is given within ten days after receiving notice of the claim. (A43-44) Moreover, the Agreement further provides that "If the Agent fails to give such notice within the specified time, he shall be deemed to have elected not to join in the defense of the claim." (A44) No such notice is claimed to have been given by the Apter firm. Their claim to "actively defend" is clearly a contrived afterthought made for the first time in their reply brief. But even more important, there is nothing for the Apter firm to "actively defend". The complaint at bar in Count III seeks a judgment for damages against the individuals, pursuant to the indemnification provisions of the merger agreement, an order "directing plaintiff IEC and the defendant law firm of Apter, Nahum & Lenge (the Escrow Agents) to

comply with paragraph 4.2.2 of the Agreement and jointly execute whatever documents may be necessary in order to permit withdrawal of the sum to be ascertained from said Bank or Banks in which the Escrow Fund is deposited." In other words, the order sought against the escrow agent is in the nature of a ministerial act to be done only after a judgment for damages has been awarded against the individual defendants. As a stakeholder, the Apter firm should simply submit its rights to the Court and abide by any court orders hereafter entered.

Second, it is doubtful that the applicability of the Code is subject to an "estoppel" defense, since it is the Courts which bear the responsibility of enforcing the provisions of the Code and promoting the integrity of the Bar in the public interest.

Third, if the Apter firm persists in claiming a personal right to defend the Escrow Fund, the obvious result of which would be to permit them to use the confidential information that they otherwise would be prohibited from using, a serious ethical problem is thus presented which can be resolved only by their withdrawal as escrow agents as well as their disqualification from representing the individual defendants. Withdrawal as escrow agent would result in their dismissal as parties defendant. The desperate

attempt of the Apter firm to remain in this case in some capacity and thereby control the defense attests to the need for prompt prophylactic relief and the immediate disqualification of that firm from all phases of this litigation.

CONCLUSION

For each of the foregoing reasons, the order of the District Court granting plaintiffs' motion disqualifying defendants' counsel should be modified so as to provide for immediate and complete disqualification of the firm of Apter, Nahum & Lenge from participation in all aspects of this litigation.

The order of the District Court denying defendants' motion to disqualify plaintiffs' counsel should in all respects be affirmed.

Dated: June 9, 1975

Respectfully submitted,

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Court Press Form No. 2-Affidavit.
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UNITED STATES COURT OF APPEALS
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Defendants-Appellants-Cross Appellees,

J. KEVIN FOLEY, Defendant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 10th day of June, 1975, he served two copies of the Reply Brief of Plaintiffs-Appellees-Cross Appellants on Apter, Nahum & Lenge, Esqs.

the attorneys for the Defendants-Appellants-Cross Appellees by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. 101 Pearl Street, Hartford, Conn. ( ) that being the address designated by them for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this

10th day of June, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976